REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 22469/13

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2013.05.20 ....
DATE SIGNATURE

20/5/2013

In the matter between:

TRANS ORANGE CONFERENCE OF THE SEVENTH DAY ADVENTIST CHURCH Applicant

and

NGCINGWANA INCORPORATED First Respondent

ELLIOT SIBANYONI Second Respondent

J U D G M E N T

MAKGOKA, J:

[1] The applicant seeks, on an urgent basis, an interim order preserving an amount of R470 000 in a trust account of a firm of attorneys (the first respondent) and for interdicting the first respondent from dealing with the money without the applicant's

written consent. The interim relief is sought pending finalisation of an application for among others, the return of the money to the applicant. In his confirmatory affidavit to the second respondent's opposition, the first respondent states that an amount of R256 000 has been utilized already.

[2] The applicant is a conference of the Seventh-Day Adventist Church, which is a worldwide church organisation. The church has a property holding entity on its behalf called, Sedcom. The second respondent is a member of the church, Gauteng region. Up and until 24 February 2013, he was a member of the executive committee of the applicant, and held the office of Treasurer/Financial Officer. The circumstances under which he was removed are controversial, but irrelevant for the present purposes.

[3] During 2006 Sedcom entered into an agreement with Prestige Park (Pty) Ltd (Prestige) in terms of which the company purchased two properties from Sedcom, being Holding 8 and Holding 15, Diswillmar, Gauteng Province. Since the sale of the property a protracted dispute arose between the West Rand districts of the applicant. The impasse led to the transfer not being effected to Prestige. On 24 February 2013 a special general meeting of the applicant was convened in Bloemfontein, at which, two relevant decisions were taken by the applicant's delegates. Firstly that the properties be transferred to Prestige, and secondly that the second respondent and other members of the Executive Committee of the applicant, who opposed the transfer to Prestige, be removed from office and replaced by a new Executive Committee.

[4] On the same day, the second respondent and other members of the executive committee held a separation meeting, in which they resolved to transfer the money from the applicant's bank account in order to fund litigation necessary to give effect to a decision of the West Rand Management Board of 17 February 2013[1]. The money was paid into the first respondent's account on 25 February 2013.

[5] On 5 March 2013, under case no. 13726/2013 in this court, an order was sought on an urgent basis by a member of the applicant interdicting the applicant from transferring the immovable properties to Prestige. The applicant gave an undertaking not to transfer the properties pending finalisation of the urgent application in the normal course. The undertaking was made on order of court on 7 March 2013

[6] On 1 April 2013 the payment of the money into the account of the first respondent, from its account, came to the knowledge of the applicant. The applicant sought an undertaking from the first respondent to return the money to it, which the first respondent refused to do. In its letter dated 4 April 2013, the first respondent stated the following:

> 'We have had the opportunity to consult with Mr Sibanyoni, the Excom of the TOC led by Pastor Setsiba and have been instructed to advise you and your client (TOC Illegal/unlawful structure that all decisions taken by the Excom of the TOC led by Mr Setsiba, Sibanyoni and Segopa to transfer the R470 000.00 to our attorneys trust account is above board based on a valid legal mandate given to us by clients' to launch a legal action against the unlawful decision taken by your clients' SAU, Sedcom, an urgent application at the North Gauteng High Court under case number 13726/2013 which matter is *sub judice* and a review application of the unlawful decisions taken by your clients. Your client's contention that the transfer of R470 000.00 was unlawful as it was not authorised is denied as devoid of all substance and sense and any ill contemplated urgent application by your client against us will be vigorously defended and all cost incurred therewith will be for your own account.'.

[1] That decision entailed the removal of the issue pertaining to the sale of the properties from the agenda of the applicant's special constituency meeting of 24 February 2013, a request the applicant to urgently interdict and defend the sale of the properties and a request of the applicant to appoint a forensic investigator

[7] Urgency is disputed. Ms. *Colyn*, counsel for the respondents, urged me to strike the matter off the roll for lack of urgency. I disagree. I am satisfied that the matter is urgent, involving, as it does, an officer of this court, who, as mentioned in the preceding paragraph, refused to comply with his trust creditor's instructions as to the utilization of trust funds standing against that trust creditor's credit.

[8] Apart from contesting urgency, the second respondent raised three points *in limine*. Firstly, he challenges the authority of the applicant's deponent to act on behalf of the applicant. A short answer to this is that a deponent requires no authority to depose to an affidavit on behalf of a legal entity (*Ganes v Telecom Namibia* 2004 (3) SA 615 (SCA) paras 18-19. Furthermore, authority cannot be challenged in an affidavit, but has to be done in terms of the provisions of Rule 7(1). If not, the Court can disregard such a challenge *(ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP).

[9] The second point *in limine* is that there was a misjoinder to the extent that the members of the previous executive committee, who took the decision to authorize the transfer of the money, have not been cited. There is simply no merit in this contention. The fact remains that the second respondent is the one at whose instruction, the money was paid. Besides, we are dealing here, not with the validity of the decision taken by the previous executive committee. For the present purposes I assume, without making any finding in that regard, that the previous executive committee took a proper and valid decision for the transfer of the money. At the risk of repeating myself, that decision has been reversed by the new executive committee.

[10] The third and final point is that there is a dispute of fact which cannot be revolved on the papers. Those disputes are said to arise from the pending litigation referred to in para [5] above, and from a review application (yet to be launched) by members of the previous executive committee to review and set aside the decision on 24 February 2005 to remove the previous executive committee from office.

[11] In every case the court must examine the alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant (*Peterson v Cuthbert & Co. Ltd* 1945 AD at 428; *Von Steen v Von Steen* 1984 (2) SA 203 (T); *Standard Credit Corporation Ltd v Smyth* 1991 (3) SA 179 (W) at 181H; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 347G-H; *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F.

[12] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. See *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375F-376B. The court must take 'a robust, common sense approach' to a dispute of fact and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. See *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H; *Gemeenskapontwikkelingsraad v Williams* (2) 1977 (3) SA 955 (W) at 575 (O) at 599D-E; *The Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 621C-E; *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia* 1994 (2) SA 622 (NmHC) at 627H-628A.

[13] In the present matter, I fail to see how the alleged dispute of fact (if any) in the pending application and yet to be launched litigation, can remotely constitute a dispute of fact in the present application. It might be that the dispute between various members of the applicant presents factual disputes. But such disputes are irrelevant in this application. This application is concerned merely with the preservation of funds, and does not, in any manner, determine the substantive issues between the parties. The submission regarding factual dispute is therefore self-evidently without merit.

[14] In my view, there are two crisp questions. Firstly, the ownership of the money, and secondy, the position of the first respondent *vis-a vis* the money. With regard to the first, there can be no doubt that the money belongs to the applicant. The money was transferred from the bank account of the applicant and there can be no question that it is money belonging to the applicant. The second respondent's grim denial that the money is that of the applicant is spurious and without any foundation.

[15] Even if one accepts the second respondent's assertion that the payment of the money was made pursuant to a resolution validly taken by the applicant's executive committee on 24 February 2013, it is clear that that decision had been subsequently recalled by the new executive committee. This is clear from the applicant's letter to the first respondent on 1 April 2013. The money remains the property of the applicant, irrespective of who constitutes its executive committee. The applicant, and not individual members of the executive committee, is the trust creditor of the first respondent, who is obliged to deal with the money only on the instructions of its trust creditor, the applicant. That answers the second question, and that should be the end of the matter.

[16] In the circumstances I am satisfied that the applicant has satisfied the requisites for an interim interdict, namely:

(a) a *prima facie right*,

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) a balance of convenience in favour of granting of the interim relief; and

(d) the absence of any other satisfactory remedy.

[17] Before I conclude, one worrying aspect needs to be mentioned. It relates to the first respondent's stance when the applicant first requested that the money be returned to it. I have quoted the relevant paragraph of its letter in para [6] above. By refusing to accede to the trust creditor's instruction to return the money to it, demonstrates, in my view the practitioner's lack of insight into the nature of the trust account and the funds held in it on behalf of a trust creditor. It was certainly unwise of the attorney to involve himself in the factionalism besetting the applicant's members. His obstinate refusal to comply with his client creditor's instruction, led directly to this unnecessary application.

[18] As to the order to be made, it is to be recalled that the first respondent stated that an amount of R256 000 had been expended on legal fees. The amount is no longer whole. An order for the preservation of the portion no longer available, would amount to a *brutum fulmen.* Accordingly I intend to order the preservation of the balance of R214 000.

[19] In the result I make the following order:

1. Pending the determination of the application for the relief sought in part B of this application:

    1.1 the first respondent is interdicted from utilising the amount of R214 000 or any part thereof transferred to it from the bank account of the applicant with number 000778214 held at the Library Gardens Branch of the Standard Bank on 25 February 2013 without the written consent of the applicant;

    1.2 it is declared that the second respondent has no authority to appropriate, use or apply the amount referred to in 1.1 above, and to that extent he is interdicted from doing so;

2. The costs stand over for determination at the hearing of the application for the relief claimed in part B of the application;

3. The Law Society of the Northern Provinces (the Law Society) is required to investigate the conduct of its member, Mr. Siza Sizilizwe Ngcingwana for the role he played in the matter, in light if what stated in this judgment.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	: 14 MAY 2013
JUDGMENT DELIVERED	: 20 MAY 2013
FOR THE APPLICANT	: ADV A LIVERSAGE
INSTRUCTED BY	: ROSSOUWS INC. c/o PETZER DU TOIT & RAMULIFHO, PRETORIA
FOR THE RESPONDENTS	: ADV T COLYN
INSTRUCTED BY	: NGCINGWANA INC. PRETORIA